

1 JOHN C. FISH, Jr., Bar No. 160620
jfish@littler.com
2 ANDREW M. SPURCHISE, Bar No. 245998
aspurchise@littler.com
3 EMILY E. O'CONNOR, Bar No. 279400
eoconnor@littler.com
4 LITTLER MENDELSON, P.C.
650 California Street
5 20th Floor
San Francisco, California 94108.2693
6 Telephone: 415.433.1940
Facsimile: 415.399.8490

7 Attorneys for Defendants
8 UBER TECHNOLOGIES, INC.,
RASIER, LLC, AND RASIER-CA, LLC
9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 NATIONAL FEDERATION OF THE
13 BLIND OF CALIFORNIA, MICHAEL
14 KELLY, MICHAEL HINGSON, and
MICHAEL PEDERSEN,

15 Plaintiffs,

16 v.

17 UBER TECHNOLOGIES, INC., RASIER,
18 LLC, and RASIER-CA, LLC,

19 Defendants.
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Case No. 3:14-cv-04086-NC

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO DISMISS PLAINTIFFS'
FIRST AMENDED COMPLAINT AND/OR
FOR A MORE DEFINITE STATEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

[F.R.C.P. 12(b)(1), 12(b)(6), 12(e)]

Date: February 5, 2015
Time: 1:00 p.m.
Location: Courtroom A, 15th Floor
San Francisco Federal Courthouse

Trial Date: None set.
Complaint Filed: September 9, 2014
FAC Filed: November 12, 2014

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on February 5, 2015, in Courtroom A, 15th Floor of the U.S. District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, at 1:00 p.m., or as soon thereafter as counsel may be heard, Defendants UBER TECHNOLOGIES, INC., RASIER, LLC and RASIER-CA, LLC will move the Court to dismiss this action, pursuant to Federal Rule of Civil Procedure Rules 12(b)(1) and (b)(6) and/or for a more definite statement pursuant to Federal Rule of Civil Procedure Rule 12(e) based on the following grounds:

1. Plaintiffs National Federation of the Blind of California's ("NFB") and Michael Hingson's ("Hingson") are subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) because Plaintiffs lack standing to sue. Neither Plaintiff meets the threshold Constitutional or statutory standing requirement necessary to seek injunctive or declaratory relief sought.

2. Plaintiff Michael Pedersen's ("Pedersen") First through Fourth Causes of Action must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for failure to sufficiently plead standing. Alternatively, Pedersen should be required to provide a more definite statement pursuant to Federal Rule of Civil Procedure 12(e) on the grounds that the FAC is too vague and ambiguous as to the basis for his standing for Defendants to file a proper responsive pleading.

3. As to all Plaintiffs, even if Plaintiffs NFB, Hingson and Pedersen could demonstrate the requisite standing to sue, Plaintiffs' First, Second, Third and Fourth Causes of Action are subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) to the extent it is based on the allegation that Uber's app or website constitute a place of public accommodation or that Defendants own, lease or operate a place of public accommodation under the ADA.

The motion will be based upon this notice of motion and motion and upon Defendants' memorandum of points and authorities, Defendants' request for judicial notice filed herewith, the declaration of Michael Colman filed herewith, the pleadings and papers filed herein, and any other matters considered by the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Uber Technologies, Inc. (“Uber”) is a technology company that offers a smartphone application (“app”) that connects passengers looking for transportation to independent transportation providers looking for passengers. Specifically, Uber provides the technology that allows passengers and transportation providers to make a “match” based on their location and passengers’ vehicle preference. Raiser, LLC and Rasier-CA, LLC are wholly-owned subsidiaries of Uber that provide lead generation services via Uber’s uberX platform to independent transportation providers who operate cost-efficient, every-day vehicles.¹

As stated in Uber’s motion to dismiss Plaintiffs’ initial Complaint, Defendants’ mission is to connect its users to safe, reliable rides as efficiently as possible. Defendants value all of its users, but are on the cutting edge of expanding accessibility for individuals with disabilities to a variety of reliable transportation options. Among other things, this includes, in some cities, exploring partnerships with taxi and limousine companies that offer wheelchair accessible vehicles as a means of increasing the availability of these vehicles to disabled users of the Uber app. Plaintiffs do not dispute that Uber’s technology has greatly increased the mobility and freedom of Uber users with disabilities, particularly the blind; nor could they. In fact, Plaintiffs’ allegations that Defendants have somehow failed to meet their obligations to accommodate blind individuals with service animals have no merit whatsoever.

However, the Court need not reach the merits of Plaintiffs’ allegations to conclude that the First Amended Complaint (the “FAC”), just like the initial Complaint, is fatally flawed and subject to dismissal.

The FAC highlights the clear intention by Plaintiff NFB to circumvent the arbitration agreement in place between Uber users and Defendants. Despite identifying in the FAC numerous NFB members who use the Uber app and have allegedly been denied access to transportation because of their service animals, not one of them is named as an individual Plaintiff. Instead, the

¹ The Rasier entities shall be referred to as “Rasier.” Collectively, Uber and Rasier shall be referred to as “Defendants.”

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1 three named Plaintiffs are all individuals who have not accepted Defendants' Terms of Use and the
 2 arbitration agreement contained therein. This is because the arbitration agreement plainly requires
 3 individual arbitration of this dispute between Defendants and those NFB members who are Uber
 4 users, meaning those individuals are not entitled to relief from this Court and NFB cannot sue on
 5 their behalf.

6 The existence of this arbitration agreement is fatal to NFB's associational standing as to the
 7 rest of its membership as well. NFB cannot seek relief on behalf of those individuals bound by the
 8 arbitration agreement, but also cannot pick and choose between those members on whose behalf it
 9 seeks relief. Accordingly, the only way the Court can provide the relief sought by NFB
 10 appropriately tailored to those individuals entitled to relief is to require *individual participation* of
 11 NFB members. NFB therefore does not meet the test for associational standing formulated by the
 12 Supreme Court and its claims must be dismissed.

13 Alternatively, NFB must be dismissed for lack of standing because it has no legal right to
 14 pursue the sweeping relief it asks the Court to impose upon Defendants, including regulating the
 15 conduct of thousands of independent transportation providers using its platform to book passengers.

16 Defendants also move to dismiss Plaintiff Hingson on the grounds that he lacks standing
 17 because he has not suffered cognizable legal injury under the ADA, Unruh or the DPA. Similarly,
 18 Plaintiff Pedersen's claims must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1)
 19 for failure to sufficiently establish standing.

20 Finally, all Plaintiffs' ADA and derivative state law claims should also be dismissed pursuant
 21 to Federal Rule of Civil Procedure 12(b)(6) to the extent Plaintiffs allege Uber's app or website is a
 22 place of public accommodation or that Defendants own, lease or operate a place of public
 23 accommodation.

24 **II. FACTUAL BACKGROUND**

25 **A. Uber And Rasier.**

26 As stated in the Complaint, Uber has developed a smartphone application ("app") that
 27 enables its customers to use their smartphones to request pre-arranged transportation services.
 28 (FAC, ¶ 27.) Defendants offer the Uber app as a tool to facilitate pre-arranged transportation
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1 services, and license the use of the app to independent transportation providers. (Declaration of
 2 Michael Colman, [“Colman Decl.”], ¶¶ 3-5, Exh. A.)² Defendants do not own, lease or operate any
 3 vehicles for transporting users, and do not employ people to operate vehicles. (Colman Decl., Exh.
 4 A; Defendants’ Request for Judicial Notice [“RJN”], Exh. A at 24.)³

5 **B. The UberX Platform.**

6 Among the transportation options available through the app, the uberX platform connects
 7 users to independent transportation providers operating cost-efficient, everyday vehicles.⁴ (Colman
 8 Decl., ¶ 5.)

9 Individuals seeking to use the Uber app to request a ride must first agree to Uber’s User
 10 Terms and Conditions. (Colman Decl., ¶ 8, Exh. B.) Once a user agrees to the User Terms and
 11 Conditions, he or she can use the app to select the type of service (e.g., uberX) he or she desires.
 12 After the service is selected, the user can request a ride from available transportation providers on
 13 that platform. (*Id.*)

14 The User Terms and Conditions include an arbitration provision that requires disputes to be
 15 resolved through final and binding, *individual* arbitration. (*Id.*) The arbitration provision states, in
 16 relevant part, as follows:

17 You agree that any dispute, claim or controversy arising out of or
 18 relating to these Terms or the breach, termination, enforcement,
 19 interpretation, validity thereof or the use of the Services...will be
 20 settled by binding arbitration between you and Uber...You
 21 acknowledge and agree that you and Uber are each waiving the right to
 22 a trial by jury or to participate as a plaintiff or class in any purported
 class action or representative proceeding. Further, unless both you and
 Uber otherwise agree in writing, the arbitrator may not consolidate
 more than one person’s claims, and may not otherwise preside over
 any form of any class or representative proceeding.

23 (Colman Decl., ¶ 8, Exh. B at § 6.)

24 Plaintiff Michael Hingson has not created an Uber user account, agreed to the User Terms
 25 and Conditions, or taken a ride booked through the uberX platform. (FAC, ¶ 67.) Plaintiffs Michael

26 _____
 27 ² Exhibit A to the Declaration of Michael Colman is the Rasier Software Sublicense & Online Services Agreement.

28 ³ Exhibit A to Defendants’ RJN is the California Public Utilities Commission’s “Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry.”

⁴ Only transportation arranged through the uberX platform is at issue in this case.

1 Kelly and Michael Pederson have also not created Uber user accounts or agreed to the User Terms
 2 and Conditions. (FAC, ¶ 23, 25.) However, nearly all the NFB members referenced in paragraphs
 3 42 through 63 of the First Amended Complaint are alleged to be Uber users, and are therefore bound
 4 by the arbitration agreement set forth in the User Terms and Conditions.

5 Similar to the passengers who use the Uber app, any independent transportation provider who
 6 wishes to access Uber's uberX software platform to book passengers must enter into a "Software
 7 Sublicense & Online Services Agreement" ("Sublicense Agreement") with the applicable Rasier
 8 entity (in California: Defendant Rasier-CA, LLC). (Colman Decl., ¶ 6, Exh. A.) There are several
 9 thousand transportation providers authorized to use the uberX platform to book passengers who are
 10 currently operating in California. (Colman Decl., ¶ 7.)

11 The very outset of the Sublicense Agreement states that transportation providers
 12 independently operate their own transportation businesses. The Sublicense Agreement is explicit
 13 that any relationship between Defendants and third party transportation providers is *solely* in the
 14 nature of a contractual relationship between separate business ventures:

15 You acknowledge and agree that Company's provision to you of the
 16 Driver App and the Uber Services creates a direct business relationship
 17 between Company and you. Company does not, and shall not be
 18 deemed to, direct or control you generally or in our performance under
 19 this Agreement, specifically, including in connection with your
 20 provision of Transportation Services, your acts or omissions, or your
 operation and maintenance of your Vehicle. You retain the sole right
 to determine when and for how long you will utilize the Driver App or
 the Uber Services...You acknowledge and agree that you have
 complete discretion to provide services or otherwise engage in other
 business or employment activities.

21 ...

22 **Relationship of Parties**

23 [T]he relationship between the parties under this Agreement is solely
 24 that of independent contractors. The parties expressly agree that: (a)
 25 this Agreement is not an employment agreement, nor does it create an
 26 employment relationship, between Company and you; and (b) no joint
 venture, partnership, or agency relationship exists between Company
 and you.

27 (*Id.* at 2.4, 13.1.)

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C. UberX, As A “TNC”, Complies With Requirements Imposed By The California Public Utilities Commission.

In September 2013, the California Public Utilities Commission (“CPUC”) promulgated new rules applicable to transportation network companies (“TNCs”). (Defendants’ RJN, Exh. A.) The CPUC defines TNC as follows: “an organization...operating in California that provides prearranged transportation services for compensation using an online-enabled application (‘app’) or platform to connect passengers with drivers using their personal vehicles.” (*Id.* at 65.) In promulgating these rules, the CPUC expressly distinguished “taxi services” from the transportation that can be arranged through the uberX platform:

...1) before a passenger can request a ride, the passenger must download the software application, provide identification information and agree to the TNC service agreement, and 2) for a particular trip, the passenger must input information regarding current location, and finally, 3) a TNC driver cannot be hailed on the street similar to a taxicab where no information is shared until the passenger enters the vehicle.

(*Id.* at p. 66.)

The CPUC explained that it recognizes and regulates three modes of passenger transportation for compensation: (1) taxi services (regulated by cities and/or counties), (2) charter-party carrier services and (3) passenger-stage companies (regulated by the CPUC). (*Id.* at 65.) It found that Uber, with respect to Rasier and the uberX platform only, is a TNC, and required to obtain a Class P charter-party carrier permit. (*Id.* at 72.) As stated by the CPUC, unlike other charter-party carriers, Uber is “not permitted to itself own vehicles used in its operation or own fleets of vehicles.” (*Id.* at 24.)

Defendants are obligated to comply with certain safety requirements as it relates to the transportation providers who offer transportation services through the uberX platform. (*Id.* at 26-29.) However, as a matter of law, these controls do not alter the independent business relationship between Defendants and the third party transportation providers who offer transportation using the uberX platform.⁵ Beyond these requirements, and subject to the terms of the Sublicense Agreement,

⁵ *SIDA of Hawaii, Inc. v. NLRB*, 512 F. 3d 853, 862-863 (9th Cir. 1975) (“the fact that a putative employer incorporates into its regulations controls required by a government agency does not establish an employer-employee relationship”); *see also*, *Southwest Research Institute v. UIAB*, 81 Cal. App. 4th 705, 709 (2000) (compliance with FAA and EPA training requirements not evidence of control); *Arnold v. Mut. Of Omaha Ins. Co.*, 202 Cal. App. 4th 580, 588-589 (1992) (compliance with insurance requirements not evidence of control).
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Defendants are contractually prohibited from exercising control over the transportation service provided.

III. DEFENDANTS' MOTION TO DISMISS SHOULD BE GRANTED

A. Plaintiffs NFB And Hingson Lack Standing And Their Claims Should Be Dismissed Pursuant To FRCP 12(b)(1).

Plaintiffs have the burden of establishing standing sufficient to defeat this motion to dismiss. *Savage v. Glendale Union High School*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003). For jurisdictional purposes, a court "may not assume the truth of the allegations in a pleading which are contradicted" by other record evidence. *Alexander v. Circus Circus Enters., Inc.*, 972 F.2d 261, 262 (9th Cir. 1992). Moreover, as to the uncontroverted allegations in the Complaint, the Court need not accept as true legal conclusions or inferences that are unsupported by the facts set out in the Complaint. *O'Bryan v. Holy See*, 556 F.3d 361, 376 (6th Cir. 2009). The complaint must contain "sufficient jurisdictional facts to state a claim which is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, (2007).

1. Dismissal Of The First Cause Of Action, As To Plaintiffs NFB And Hingson, Is Warranted Because They Lack Standing.

a. Plaintiff NFB lacks standing to sue in its own right.

NFB appears to assert (though not clearly) it has standing to sue in its own right (*i.e.* organizational standing): NFB "sues in furtherance of its extensive efforts and expenditure of resources in advancing its mission to improve independence of the blind." (FAC, ¶ 22.) The FAC asserts that Defendants' alleged failure to accommodate discrimination against NFB's members frustrates NFB's mission and diverts its resources. NFB lacks standing under this theory.

The Supreme Court has held that a plaintiff generally must assert his or her own legal rights and interests and may not rest his or her claim for relief on the legal rights or interests of third parties. *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). When asserting standing on its own behalf, an organization must be able to demonstrate some injury *to the association itself* that meets the constitutional standing requirements. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19

(2011) (training required only with respect to compliance with state law directives regarding insurance sales did not constitute evidence of control).

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1 (1982).

2 NFB's vague, unsupported assertions regarding "frustration of mission" and the "diversion of
3 resources" fall well short of establishing that NFB *itself* suffered an injury-in-fact sufficient to confer
4 organizational standing. *Clark v. McDonald's*, 213 F.R.D. 198, 209 (D. N.J. 2003) (in ruling that a
5 disability rights organization asserting it suffered a "frustration of mission" injury did not have
6 organizational standing, the court emphasized that the alleged injury was the result of defendant's
7 purported discrimination against others, not the organization itself); *Spann v. Colonial Village, Inc.*,
8 899 F. 2d 24, 27 (D.C. Cir. 1990) ("An organization cannot, of course, manufacture the injury
9 necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule
10 otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no
11 real limitation.")

12 Indeed, in describing NFB's mission, NFB alleges that it seeks to "take any [] action which
13 will improve the overall condition and standard of living of the blind." (FAC, ¶ 22.) Given NFB's
14 stated mission to "take any action" to achieve equality for the blind, the instant litigation seemingly
15 *advances*, rather than frustrates NFB's mission. *Clark v. Burger King Corp.*, 255 F. Supp. 2d 334,
16 344 (D.N.J. 2003) (where ADA advocacy organization alleged it suffered drain of resources due to
17 legal efforts directed against discrimination, the court found that the organization had failed to show
18 an impairment to its mission that would constitute an injury in fact and stated that, "absent evidence
19 to the contrary, it appears that [the organization] is an organization whose primary purpose is ADA
20 litigation"). Therefore, NFB cannot rely on organizational standing as a basis for asserting its First
21 Cause of Action under the ADA.

22 **b. Plaintiff NFB lacks associational standing.**

23 Even where an association lacks standing to sue in its own right because it has not itself
24 suffered an injury-in-fact, it will nevertheless have "standing to bring suit on behalf of its members
25 when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it
26 seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the
27 relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State*
28

1 *Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Associations suing in a representative capacity are
 2 bound by the same limitations and obligations as the members that they represent. *Id.* at 342-343.

3 (1) **Certain NFB members are contractually obligated to**
 4 **individually arbitrate these claims against Defendants**

5 NFB purports to sue on behalf of its members who have been denied access to or deterred
 6 from using the uberX service to book transportation. (FAC, ¶ 22.) Plaintiffs contend that NFB
 7 members use the uberX service (*see* FAC ¶ 40), and identify a number of specific NFB members
 8 who have clearly created an account to use the app (*see* FAC ¶¶ 42-63). As a pre-condition to
 9 creating an account, these NFB members must necessarily have agreed to the User Terms and
 10 Conditions, and are therefore bound by the arbitration agreement contained therein. (Colman Decl.,
 11 ¶ 8, Exh. B.) The arbitration agreement provides as follows:

12 You agree that any dispute, claim or controversy arising out of or
 13 relating to these Terms or the breach, termination, enforcement,
 14 interpretation, validity thereof or the use of the Services⁶...will be
 15 settled by ***binding arbitration between you and Uber***...You
 16 acknowledge and agree that you and Uber are each waiving the
 17 right to a trial by jury or to participate as a plaintiff or class in any
 18 purported class action ***or representative proceeding***. Further,
 19 unless both you and Uber otherwise agree in writing, ***the arbitrator***
 20 ***may not consolidate more than one person's claims***, and may not
 21 otherwise preside over any form of any class or representative
 22 proceeding.

23 (Colman Decl., ¶ 8, Exh. B at § 6.)

24 Under the Federal Arbitration Act (FAA), arbitration agreements “shall be valid, irrevocable,
 25 and enforceable.” 9 U.S.C. § 2. This provision reflects a “liberal federal policy favoring arbitration
 26 agreements.” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* 460 U.S. 1, 24-25 (1983)
 27 (“Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”)
 28 There are only two gateway issues that need to be decided by a court: (1) whether an applicable

⁶ The Terms and Conditions broadly define “Services” as follows: “applications, websites, content, products and services...made available in the United States and its territories and possessions by Uber Technologies, Inc. and its subsidiaries and affiliates.” The agreement goes on to state that “the Services constitute a technology platform that enables users of Uber’s mobile applications or websites provided as part of the Services...to arrange and schedule transportation and/or logistics services with third party providers of such services, including independent third party transportation providers...under agreement with Uber or certain of Uber’s subsidiaries.” (Colman Decl., ¶ 8, Exh. B.) As noted above, Rasier, LLC and Rasier-CA, LLC are wholly owned subsidiaries of Uber Technologies, Inc.

1 agreement to arbitrate exists; and (2) whether the disputes at issue are covered by the arbitration
 2 agreement. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-85 (2002). All other issues are
 3 for the arbitrator to decide. *Id.*

4 The two gateway issues for the Court to determine are undisputed here. A valid agreement to
 5 arbitrate exists as between those members of NFB who have signed up for an Uber account because
 6 each such member must first agree to the User Terms and Conditions before using the app to request
 7 transportation. The User Terms and Conditions expressly include Uber's subsidiaries. Therefore,
 8 there is no question a valid agreement to arbitrate exists as between at least some of NFB's members
 9 and Defendants.

10 The dispute at issue is also clearly covered by the arbitration agreement, which covers any
 11 dispute arising out of the use of the app. NFB contends that drivers using the uberX platform refuse
 12 to transport blind individuals with service animals and that Defendants have failed to implement
 13 procedures to remedy such instances. (FAC, ¶ 75.) NFB also asserts that its members have
 14 difficulty accessing Uber's website and that the app's customer rating system disparately affects
 15 blind passengers. (FAC, ¶¶ 47, 58, 64.)

16 Because an arbitration agreement exists, and the claims at issue are covered by the
 17 agreement, it is presumed to be valid and enforceable. *Cox v. Ocean View Hotel Corp.*, 533 F.3d
 18 1114, 1119 (9th Cir. 2008). Accordingly, to the extent individual Uber user NFB members wish to
 19 advance any of the foregoing claims against Defendants, those claims must be pursued individually
 20 in arbitration.⁷

21 Those NFB members bound by the arbitration provision cannot escape their commitment to
 22 arbitrate by having a representative sue on their behalf, and NFB cannot represent those individuals
 23 in this lawsuit because those individuals have no right to sue in Court. *See Crow Tribe of Indians v.*
 24 *Campbell Farming Corp.*, 828 F. Supp 1468 (D. Mont. 1992), *aff'd*, 31 F. 3d 768 (9th Cir. 1994)
 25 (Tribe did not have representational standing to assert interests of general membership where
 26 individual members' claims were barred by statute of limitations); *see also Moses H. Cone Mem'l*

27
 28 ⁷ This motion is not intended to prejudice Uber's right to compel any party bound by the arbitration agreement to
 arbitrate these claims consistent with the terms of the arbitration agreement.

1 *Hosp.*, 460 U.S. at 20.⁸ To permit NFB to contravene the agreement between Uber and its users by
 2 representing its member Uber users in this case would be contrary to the strong public policy
 3 favoring arbitration.

4 In addition to suing on behalf of its members who are Uber users bound by the Arbitration
 5 Agreement, NFB purports to sue on behalf of members like Plaintiff Michael Kelly and Manveen
 6 Chahal (*i.e.* individuals who do not have Uber user accounts, and thus are not bound by the
 7 Arbitration Agreement, but who have allegedly been denied service when traveling with companions
 8 who *do* have Uber accounts.) (FAC, ¶ 1, 23.) In short, NFB seeks to sue on behalf of a membership
 9 which includes ***both*** individuals who are parties to the arbitration agreement and individuals who are
 10 not parties to the arbitration agreement.⁹

11 Furthermore, NFB cannot opt to proceed on behalf of only a portion of its membership (*i.e.*
 12 those not bound by the Arbitration Agreement) without relinquishing its claim to associational
 13 standing. *See In Re: Managed Care Litigation*, 2003 U.S. Dist. LEXIS 23035, *39 (S.D. Fla. 2003),
 14 *aff'd by Klay v. Pacificare Health Sys. Inc.*, 389 F. 3d 1191 (11th Cir. 2004) (“Associations may not
 15 pick and choose the members that they represent...An association that abandons some of its
 16 allegedly injured members no longer purports to be ‘representative’ of its membership.”); *see also*,
 17 *Maryland Optometric Association v. Davis Vision, Inc. et al.* (Defendants’ RJN, Ex. B.)
 18 Representation of only part of its membership violates the prudential standing requirement set forth
 19 in the third prong of the *Hunt* test, which permits an organization like NFB to sue only when it can
 20 obtain prospective relief on behalf of ***all*** its allegedly injured members without individual

21 _____
 22 ⁸ Indeed, what NFB seeks to do here is analogous to cases where a class action representative attempts to represent
 23 putative class members who are bound by an arbitration agreement. For years, California courts have recognized that
 24 people with arbitration agreements cannot be members of a class action in a judicial forum. *See Frame v. Merrill Lynch,*
 25 *Pierce, Fenner, & Smith, Inc.*, 20 Cal. App. 3d 668 (1971) (court ruled that putative class members who were party to an
 26 arbitration agreement were bound to arbitrate because it would be “inappropriate to allow [putative class members] to
 27 evade the terms of the agreement simply by bringing their action together as a ‘class’ rather than as individuals”);
 28 *Vernon v. Drexel, Burnham & Co., Inc.*, 52 Cal. App. 3d 706, 716 (1975) (court compelled the arbitration of the claims
 of a named class representative stating that “a class action cannot be used to subvert an otherwise enforceable agreement
 to arbitrate contained in a valid contract merely because other individuals, who might qualify as members of a class,
 were subject to the same provision.”). The same result is warranted here. NFB sits in the “shoes” of its members and
 cannot seek relief on behalf of parties to an arbitration agreement.

⁹ The FAC lists at least eight individual NFB members who were allegedly refused service when attempting to book a
 ride using the uberX platform. All but two of those individuals have signed up for Uber accounts and are thus bound by
 the arbitration agreement.

1 participation.

2 *In Re: Managed Care Litigation* is instructive. 2003 U.S. Dist. LEXIS 23035 at *38. There,
3 medical associations sought injunctive relief on behalf of their respective memberships. *Id.* Because
4 some association members were bound by arbitration clauses with respect to the claims asserted and
5 some were not, the associations attempted to bring suit only on behalf of members who were not
6 bound. *Id.* The court rejected the associations' approach and found that associational standing was
7 lacking because under *Hunt*, individual participation would be required. *Id.* at *40-41. The court
8 stated as follows: "participation of individual members is unavoidable. The only way for the Court
9 to determine which members have claims not subject to arbitration and what prospective relief might
10 be appropriate for those members is for each member to participate and defend against a motion to
11 compel arbitration." *Id.*

12 Individual participation would likewise be required here to determine whether the member is
13 entitled to relief through NFB's representation or only on an individual basis in arbitration. The only
14 way for NFB to proceed is to divide its membership, *which it cannot do* without sacrificing the
15 associational standing requirements under the *Hunt* test. NFB must therefore be dismissed based on
16 a lack of standing.

17 **(2) NFB lacks the broad associational standing necessary to**
18 **secure the relief it seeks**

19 NFB's claim to associational standing fails for additional reasons as well. In the FAC
20 Plaintiffs list the names of ten other individuals who are *not* identified as NFB members but who
21 were allegedly refused service by drivers using the uberX platform.¹⁰ Six of those individuals were
22 allegedly refused service by transportation providers who were booked using uberX in non-
23 California cities. (FAC, ¶¶ 56-61.) Plaintiffs cannot base NFB's claim for associational standing on
24 the claims of individuals who are not members of the organization or on alleged instances of
25 discrimination that occurred outside of California. Accordingly, allegations regarding non-NFB
26 members and non-California individuals should be dismissed and disregarded for purposes of

27 ¹⁰ These individuals are as follows: Michael Pedersen, Robert Schulenburg, Richard Rueda, Thomas Foley, Sarah
28 Outwater, Mark Cadigan, Kristin Fleschner, Melissa Riccobono, Mariea Harris, Dimitrios Kouniaris, Leena Dawes.
(FAC, ¶¶ 8, 52-63.)

1 assessing NFB's standing.

2 The remaining allegations, specific to actual NFB members in California, are also
 3 insufficient to confer the broad relief sought by NFB. Even assuming the individual NFB members
 4 satisfy the standing requirements on behalf of specific members as to specific transportation
 5 providers by asserting "actual notice" of discrimination by those transportation providers, it does not
 6 follow that they (or by extension NFB) have standing to assert a generalized grievance as to each
 7 and every transportation provider offering his or her services on the uberX platform statewide.
 8 *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975) (when the asserted harm is a 'generalized grievance'
 9 shared in substantially equal measure by all or a large class of citizens, that harm alone normally
 10 does not warrant exercise of jurisdiction).

11 Yet, the relief sought by NFB is *virtually unlimited*, and requested as to each of the several
 12 thousand transportation providers operating in California. This is fatal to NFB's claim.

13 In *Small v. General Nutrition Cos.*, 388 F. Supp. 2d 83 (E.D.N.Y. 2005), the court held that a
 14 disability rights organization lacked associational standing. There, plaintiff Disabled in Action
 15 ("DIA") brought suit against GNC alleging that various features of many of GNC's approximately
 16 55 stores in New York City were not sufficiently accessible to the disabled. *Id.* at 85. Defendant
 17 moved to dismiss the complaint and argued that DIA lacked associational standing. *Id.* The court
 18 agreed, and dismissed the complaint. *Id.* at 97. The court explained as follows, "because
 19 associational standing exists only insofar as organization members have standing, *associational*
 20 *standing may not be broader or more extensive than the standing of the organization's members.*
 21 Thus, the association would only have standing with respect to the specific stores at which the [DIA]
 22 member identified in the amended complaint has standing." *Id.* at 98 (emphasis added).¹¹

23
 24 ¹¹ Here, Plaintiffs do not assert a common corporate policy, applicable across California, that violates the ADA. To the
 25 contrary, NFB *admits* that blind individuals regularly successfully book rides with independent transportation providers
 26 who use the uberX platform, but allege a lack of uniform compliance with the ADA by those transportation providers.
 27 Accordingly, the case at hand is unlike cases where courts have found standing on the basis of a common corporate
 28 policy. *See, e.g., Vondersaar v. Starbucks Corp.*, 2013 U.S. Dist. LEXIS 122064 (C.D. Cal. 2013) (Court found plaintiff
 class representative who sought to bring class claims pertaining to all California Starbucks locations based on Starbucks'
 standard, and allegedly discriminatory, counter design, had standing to sue under the ADA); *Celano v. Marriott Int'l,*
Inc., 2008 U.S. Dist. LEXIS 6172 *16-19 (N.D. Cal. 2008) (mobility disabled plaintiffs had standing to assert ADA
 claim as to all California Marriott golf courses where they alleged that identical policies regarding accessible golf carts
 existed at all golf courses owned and operated by Marriott).

1 Here, NFB appears to seek injunctive relief with respect to the entire uberX platform and
 2 every single transportation provider offering services on that platform in California.¹² Accordingly,
 3 the Complaint improperly seeks to confer associational standing on NFB that is far more extensive
 4 than the standing of its members. Because NFB cannot establish associational standing to recover
 5 the relief it seeks, its First Cause of Action should be dismissed.

6 **c. Plaintiff Hingson has not suffered an injury-in-fact and does not**
 7 **face an immediate threat of repeated injury.**

8 To establish standing to bring this Complaint, Hingson must demonstrate (1) that he has
 9 suffered an injury-in-fact; (2) that the injury is traceable to Uber's actions; and (3) that the injury can
 10 be redressed by a favorable decision. *Chapman v. Pier I Imps. (U.S.), Inc.*, 631 F.3d 939, 946 (9th
 11 Cir. 2011). In addition, "to establish standing to pursue injunctive relief, which is the only relief
 12 available to private plaintiffs under the ADA, [plaintiff] must demonstrate a 'real and immediate
 13 threat of repeated injury in the future.'" *Id.* Similarly, as the Supreme Court held in *Los Angeles v.*
 14 *Lyons*, 461 U.S. 95, 108-109 (1983), a plaintiff cannot establish standing to sue for injunctive relief
 15 merely by alleging that there is a policy and practice of discriminating generally. Instead, a plaintiff
 16 must show he is *likely* to suffer injury in the future related to his disability. Hingson does not and
 17 cannot meet this standard.

18 Hingson admits that he has not created an Uber user account, which means that he has yet to
 19 agree to the User Term and Conditions, a condition precedent to even being authorized to request a
 20 ride via the uberX platform.

21 Hingson has never himself been denied transportation services or received a poor rating from
 22 a transportation provider booked using the Uber app, and he does not (and cannot) allege that he is
 23 somehow barred from accessing the Uber app itself. Furthermore, Hingson has not alleged that Uber
 24 maintains a blanket rule banning service animals nor has he alleged that *all* drivers on the uberX
 25 platform refuse to transport blind individuals or mishandle service animals. Hingson admittedly

26 ¹² The FAC states that NFB of California is a "duly organized nonprofit association of blind Californians" and a
 27 "California State affiliate" of a national organization. (FAC, ¶ 22.) NFB states that it sues on behalf of its members,
 28 who presumably reside in California. (FAC ¶¶ 1, 22.) Accordingly, Defendants read the FAC as seeking relief with
 respect to the uberX platform in California only. However, to the extent NFB seeks an injunction as to all transportation
 providers offering their services on the uberX platform nationwide, the relief sought is plainly inappropriate.

1 asserts standing based on the “deterrent effect” doctrine.

2 Under the deterrent effect doctrine, “a disabled individual suffers a cognizable injury if he is
3 deterred from visiting a noncompliant public accommodation *because he has encountered barriers*
4 *related to his disability there.*” *Chapman*, 631 F.3d at 949 (emphasis added); *see, e.g., Pickern v.*
5 *Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1138 (9th Cir. 2002) (applying deterrent effect doctrine
6 and finding plaintiff had suffered an “actual injury” for standing purposes where plaintiff had
7 encountered accessibility barriers on a past visit to a market which deterred him from returning to
8 the market even though he preferred to shop there); *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1040
9 (9th Cir. 2008) (court found that plaintiff had standing where he had visited a 7-Eleven store on ten
10 to twenty prior occasions but was currently deterred from visiting the store because of the
11 accessibility barriers he had personally encountered in past visits).

12 Hingson claims he has been, and continues to be, deterred from creating a Uber user account
13 and requesting rides through the uberX platform based on the fact that he “knows of” various
14 instances where uberX drivers refused to transport blind individuals with service animals. (FAC, ¶
15 67.) The initial complaint cited only to Hingson’s general awareness of instances where drivers
16 refused to transport blind passengers. In response to Uber’s motion to dismiss, Plaintiffs amended
17 the complaint to assert that Hingson obtained his information regarding Uber’s allegedly
18 discriminatory practices via his “regular contact” with other NFB members. This slight amendment
19 does not confer standing on Hingson as it does not alter the fact that he has not alleged a single
20 encounter or first-hand knowledge of any barrier to receiving transportation, along with his service
21 animal, arranged through the Uber app.

22 While a disabled person is not required to engage in a futile gesture if there is “actual notice”
23 that the defendant will discriminate, here Hingson has only alleged *general, second-hand*
24 *knowledge of various instances* where uberX drivers allegedly refused to transport blind individuals
25 with service animals.¹³ *DeLil v. El Torito Restaurants*, 1997 U.S. Dist. LEXIS 22788, *12-13 (N.D.

26
27 ¹³ For example, Paragraph 67 of the FAC states “Through his regular contact with members of NFB of California and
28 other members of the blind community, Mr. Hingson has known of specific refusals by UberX drivers to transport
individuals with guide dogs...Mr. Hingson regularly attends events where fellow blind attendees with service animals
are having trouble using the uberX service.”

Cal. 1997) (while a plaintiff need not repeatedly suffer discrimination in order to assert her rights, “ADA plaintiffs who seek injunctive relief must still demonstrate that they themselves face a real and immediate threat of future harm.”); *Resnick v. Magical Cruise Co.*, 148 F. Supp. 2d 1298, 1303 (M.D. Fla. 2001) (court found plaintiffs did not have standing because “even if Plaintiffs had alleged a concrete intention to cruise on one of [cruise line’s] vessels, they would still lack the requisite reasonable grounds for their alleged belief that they would suffer discrimination. In short, there is no record evidence that Plaintiffs had knowledge at the inception of this suit of any alleged violations **from personal observation or expert findings.**”); *Moyer v. Walt Disney World Co.*, 146 F. Supp. 2d 1249, 1254 (M.D. Fla. 2000) (court found that plaintiff lacked standing to assert ADA claims where plaintiff did not visit the defendant amusement parks and provided “no evidence save inadmissible hearsay to show ‘actual notice’ of the alleged ADA violations at [the amusement parks].”). This is insufficient as a matter of law to confer standing to bring these claims.

Even if second-hand knowledge was legally sufficient to cause deterrence, Hingson fails to identify any specific passengers who were refused service. Likewise, Hingson fails to identify individual drivers who allegedly refused rides to blind individuals with service animals or mishandled service animals. His general awareness that certain transportation providers on the uberX platform (though not *all*) allegedly discriminated against blind individuals with service animals cannot constitute “actual notice” of discrimination on the part of every transportation provider on the uberX platform.

Hingson’s alleged injury is the quintessential “conjectural or hypothetical” injury: *if* he set up an Uber account, agreed to the User Terms and Conditions, and requested a ride on the uberX platform, he **might** be denied access or **might** receive a poor rating. This is insufficient to establish standing to pursue individual claims under the ADA or his derivative claims under state law. *Molski v. Arby’s Huntington Beach*, 359 F. Supp. 2d 938, 946 (C.D. Cal. 2005) (“**past exposure** to illegal conduct does not in itself show a present case or controversy regarding injunctive relief...if unaccompanied by any continuing, present adverse effects”) (emphasis added); *cf. Fortune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1080-81 (9th Cir. 2004) (where wheelchair bound plaintiff attended up to four movies per week and theater’s discriminatory seating policy was ongoing, the

1 court concluded plaintiff had established a “real and immediate threat” that the injury would be
2 repeated sufficient to permit him to pursue injunctive relief).

3 The *McDonald’s* case, cited *supra*, is instructive here. There, the complaint, brought by
4 advocacy organization Access Today and individual plaintiff Clark, alleged that Clark had visited
5 numerous McDonald’s restaurants in New Jersey and encountered various barriers. *McDonald’s*,
6 213 F.R.D. at 203. The plaintiffs also alleged that other members of the advocacy organization
7 Access Today had visited McDonald’s restaurants in New Jersey and Pennsylvania and encountered
8 various barriers. *Id.* Similar to the relief sought here, the plaintiffs sought injunctive relief against
9 all the McDonald’s-brand restaurants throughout the United States. *Id.* Defendants moved to
10 dismiss the complaint primarily on the grounds that the plaintiffs lacked standing. *Id.* at 204.
11 Individual plaintiff Clark did not allege actual notice of any ADA violation at any of the
12 McDonald’s restaurants ***he had not visited.*** *Id.* at 230 (emphasis added). Instead, like Hingson,
13 Clark alleged only that the discriminatory features of the restaurants were “generally known.” *Id.*

14 With respect to that allegation, the court stated “it would be unreasonable for the Court to
15 infer ‘actual notice’ of an ADA violation at a particular restaurant that Clark has not visited from
16 whatever general knowledge he may possess about discriminatory features said to be commonplace
17 at McDonald’s restaurants.” *Id.* Based on the lack of standing, the Court dismissed the claims
18 brought by plaintiff Clark as to any restaurant Clark had not visited. *Id.* at 234. Here, Hingson has
19 not attempted to ride in ***a single*** vehicle available on the uberX platform.

20 In *Moreno v. G&M Oil Co.*, 88 F. Supp. 2d 1116 (C.D. Cal 2000), the court reached a similar
21 conclusion. There, a plaintiff who sued G&M Oil Co. for an ADA architectural barrier violation at
22 one gas station, moved to amend his complaint to add claims about similar barrier violations at 82
23 other gas stations owned by defendant. *Id.* at 1116. The court held as follows: “there is no showing
24 this Plaintiff was subjected to or about to be subjected to discrimination at the 82 additional gas
25 stations.” *Id.* at 1117. Accordingly, the Court denied the motion for leave to amend stating that the
26 plaintiff lacked standing to assert a claim based on a generalized grievance of architectural barriers
27 at gas stations owned by G&M Oil where plaintiff was not personally discriminated against. *Id.* at
28 1118.

1 *McDonald's* and *Moreno* mandate the same result here. Because Hingson failed to establish
 2 both an injury-in-fact and an immediate threat of repeated injury, he lacks standing to bring any
 3 claim for injunctive relief under the ADA. Therefore, his claims must be dismissed.

4 **2. The Second Cause Of Action, As To Plaintiffs NFB And Hingson, Must**
 5 **Be Dismissed Because They Lack Standing To Sue Under The Unruh**
 6 **Civil Rights Act, Even If They Had Standing Under The ADA.**

7 **a. Plaintiff Hingson lacks standing because he has not himself been**
 8 **the victim of discrimination.**

9 Under the Unruh Civil Rights Act ("Unruh"), disabled individuals are entitled to full and
 10 equal access to the accommodations, advantages, facilities, privileges or services of covered entities.
 11 Cal. Civ. Code § 51, *et seq.* Unruh authorizes an "aggrieved person" to sue for injunctive relief or
 12 damages. Hingson does not qualify as an "aggrieved person" because he has never *personally* been
 13 denied service, received a poor rating, or otherwise been discriminated against in his use of the
 14 uberX service. In fact, he *cannot even use* the uberX service because he has not created a Uber user
 15 account or agreed to the User Terms and Conditions.

16 The cases interpreting Unruh "have consistently held that an individual plaintiff has standing
 17 to bring claims thereunder only if he or she *has been the victim of the defendant's discriminatory*
 18 *act.*" *Surrey v. TrueBeginnings, LLC*, 168 Cal. App. 4th 414, (2008) (court held that individual
 19 who sued a defendant online matchmaking service after he "became aware" of discriminatory
 20 business practices even though he never subscribed to or utilized its online services did not have
 21 standing under Unruh) (emphasis added); *see also Angelucci v. Century Supper Club*, 41 Cal. 4th
 22 160, 175 (2007), ("a plaintiff cannot sue for discrimination in the abstract, but must *actually suffer*
 23 the discriminatory conduct."); *Midpeninsula Citizens for Fair Housing v. Westwood Investors*, 221
 24 Cal. App. 3d 1377, 1383 (1990) (determining that standing under the Unruh extends only to persons
 25 "actually denied full and equal treatment by a business establishment.").

26 Because Hingson did not attempt to or actually create an account in order to request a ride
 27 using uberX, he did not suffer discrimination in any sense other than "in the abstract" and his Unruh
 28 claim fails. *See also Koire v. Metro Car Wash*, 40 Cal. 3d 24, 34 (1985) (under Unruh, injury occurs
 when the discriminatory policy is applied to the plaintiff.)

b. Plaintiff NFB lacks associational and organizational standing.

Like Hingson, NFB lacks standing to seek an injunction under Unruh. As described above, NFB lacks associational standing to pursue the claims it asserts in this lawsuit. As an additional ground for denial, NFB is not itself an “aggrieved party” under Unruh and accordingly, it does not have standing to sue in its own right. As noted above, a cause of action under Unruh is individual in nature. *Martin v. International Olympic Committee*, 740 F. 2d 670, 677 (9th Cir. 1984) (“the rights protected by the act are enjoyed by all persons, *as individuals*.”). Unruh confers standing “upon the victims of the discriminatory practices...the California courts have not seen fit to endorse a more expansive interpretation of these standing requirements.” *Midpeninsula Citizens for Fair Housing*, 221 Cal. App. 3d at 1386 (nonprofit organization lacked standing to sue apartment complex owners for allegedly discriminatory rental practices because the organization’s civil rights had not personally been violated).

As described above, NFB lacks standing to sue in its own right. It therefore cannot seek an injunction to compel enforcement of Unruh based on the injuries allegedly suffered by its members and its Second Cause of Action must be dismissed. *Reyes v. Atlantic Richfield*, 12 F.3d 1464, 1471 (9th Cir. 1993) (court denied the existence of representative standing under Unruh, and ruled that a franchisee lacked standing to bring a racial discrimination suit on behalf of accountants and cashiers working at the franchise); *Bowden v. Redwood Institute for Designed Educ., Inc.*, 1999 U.S. Dist. LEXIS 2881 *14-16 (N.D. Cal. 1999) (“plaintiff, not claiming membership in the asserted protected class, namely the disabled, may not...sue as a representative of the students under [] Unruh”); *Hous. Rights Ctr., Inc. v. Moskowitz*, 2004 U.S. Dist. LEXIS 28885 *9-10 (C.D. Cal 2004) (Non-profit corporation that sued defendants to redress alleged housing discrimination did not have standing to sue under Unruh, as standing is limited to “persons aggrieved” and public agency plaintiffs).

3. Plaintiff Hingson Has No Standing Under The Disabled Persons Act.

Hingson’s Third Cause of Action under the DPA for monetary damages must be dismissed. (FAC, ¶ 118.)

The DPA (Cal. Civ. Code sections 54-54.3) creates a private cause of action for damages. California courts have held that Section 54.3 incorporates a heightened standing requirement.

1 *Urhausen v. Longs Drug Stores California, Inc.* 155 Cal. App. 4th 254, 262 (2007). To maintain an
 2 action for damages pursuant to section 54.3, an individual must establish that he was denied equal
 3 access ***on a particular occasion***.¹⁴ *Donald v. Cafe Royale, Inc.*, 218 Cal. App. 3d 168, 183 (1990)
 4 (to recover monetary damages under Civil Code Section 54.3, plaintiff must show “he or she ***was***
 5 ***denied equal access on a particular occasion***”) (emphasis added); *Urhausen*, 155 Cal. App. 4th at
 6 262 (to maintain an action for damages under the DPA, plaintiff must show that “he actually
 7 presented himself to the restaurant on a particular occasion, as any other customer would do, with
 8 the intent of being...served and to purchase food...in the manner offered...[and] actually
 9 encountered access to seating inside...the restaurant that was not full and equal”).

10 Here, Hingson ***admits*** that he never created an Uber user account, that he never requested a
 11 ride through the uberX platform, and that he has never been refused service by an uberX driver.
 12 (FAC, ¶ 24.) As such, Hingson failed to plead, and cannot plead, facts indicating that he suffered an
 13 actual denial of equal access on a particular occasion. Under well-settled California law, his claim
 14 for damages under the DPA must be dismissed for lack of standing.

15 **4. The Fourth Cause Of Action For Declaratory Relief Necessarily Fails** 16 **Because Plaintiffs NFB and Hingson Lack Standing.**

17 Plaintiffs seek a declaration that Uber discriminates against blind persons in violation of the
 18 ADA, Unruh and the DPA. (FAC, ¶ 111.) Federal Rule of Civil Procedure 57 permits parties to
 19 obtain a declaratory judgment to determine their rights and obligations in cases involving actual
 20 controversies. However, Rule 57 (and the related Declaratory Judgment Act)¹⁵ does not expand the
 21 District Court’s jurisdiction. Therefore, because Plaintiffs NFB and Hingson lack standing to pursue
 22 their First, Second and Third Causes of Action, their Fourth Cause of Action for declaratory relief
 23 also fails.

24 **B. Plaintiff Pedersen’s Claims Should Be Dismissed Pursuant to FRCP 12(b)(1) For** 25 **Failure To Sufficiently Establish Standing.**

26 Pursuant to F.R.C.P. 12(b)(1), Defendants move to dismiss Plaintiff Michael Pedersen for

27 ¹⁴ The FAC explicitly states that Plaintiffs do not seek injunctive relief under section 55. (FAC, ¶ 119.)

28 ¹⁵ Courts have held that the federal Declaratory Judgment Act, 28 U.S.C.A. §2201 et seq., is “mirrored by” and
 “functionally equivalent” to Rule 57. *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F. 3d 530, 534, n.8
 (1st Cir. 1995).

1 lack of subject matter jurisdiction. Pedersen bears the burden of satisfying the case or controversy
 2 requirement of Article III by demonstrating his standing to sue at each stage of the litigation. *See*
 3 U.S. Const. art. III, § 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Pedersen has not
 4 done so here.

5 Pedersen claims that he has been and will continue to be denied access to uberX on the basis
 6 of his using a service animal. (FAC, ¶ 1, 8, 25.) However, Pedersen acknowledges that he never
 7 signed up for his own Uber user account. Rather, Pedersen claims that his wife has an account and
 8 that she has booked rides for him via the uberX platform on “multiple” occasions. (FAC, ¶ 25, 71.)
 9 The FAC does not name Pedersen’s wife or any of the transportation providers who allegedly
 10 refused him service. The FAC includes only vague allegations regarding unspecified occasions
 11 where Pedersen allegedly attempted to utilize the Uber account of another unnamed individual.
 12 Defendants are unable to identify Pedersen’s wife or otherwise determine or verify whether the FAC
 13 references a valid Uber account. In short, Pedersen’s standing to sue is tenuously based on injuries
 14 allegedly suffered as a result of his use of an unidentifiable person’s unidentifiable account.

15 Accordingly, Pedersen’s claims are far too vague and unspecific to enable Defendants to
 16 determine whether standing to sue exists. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)
 17 (where Plaintiffs include no more than “‘naked assertion[s]’ devoid of ‘further factual
 18 enhancement,’” they fail to articulate why they are plausibly entitled to relief). Plaintiff Pedersen is
 19 required to allege sufficient facts to inform Defendants of the nature of the claims and the parties
 20 against whom they are being made. Defendants are unable to prepare a meaningful response to
 21 Pedersen’s allegations because it is not clear he has standing to assert the claims in the first place.
 22 Accordingly, the FAC should be dismissed as to Pedersen. Alternatively, Defendants respectfully
 23 move for an order requiring Pedersen to provide a more definite statement pursuant to F.R.C.P 12(e)
 24 on the grounds that the FAC is too vague and ambiguous for Defendants to file a proper responsive
 25 pleading. *See Federal Sav. and Loan Ins. Corp. v. Musacchio*, 695 F. Supp. 1053, 1060 (N.D. Cal.
 26 1988) (“The proper test in evaluating a motion under Rule 12(e) is whether the complaint provides
 27 the defendant with a sufficient basis to frame his responsive pleadings.”)

28 ///

DEFS’ NOTICE OF MTN AND MTN TO
 DISMISS FAC AND/OR FOR MORE
 DEFINITE STATEMENT

C. All Plaintiffs' First, Second, Third And Fourth Causes Of Action Should Be Dismissed To The Extent They Allege Existence Of A Public Accommodation.

To survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp.*, 550 U.S. at 570; *see* Fed. R. Civ. P. 12(b)(6).

Dismissal can be based on the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F. 2d 696, 699 (9th Cir. 1988); *see also Robertson v. Dean Witter Reynolds, Inc.*, 749 F. 2d 530, 533-534 (9th Cir. 1984). While the Court must assume the Complaint's factual allegations are true, "legal conclusions need not be taken as true merely because they are cast in the form of factual allegations." *Silvas v. E*Trade Mortg. Corp.*, 421 F. Supp. 2d 1315, 1317 (S.D. Cal. 2006). "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F. 3d 979, 988 (9th Cir. 2001). Rule 12(b)(6) also "authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326-327 (1989).

Even if the Court determines that one or more of the Plaintiffs have standing, it should nevertheless dismiss Plaintiffs' Complaint to the extent it is based on the contentions that Uber's app or website constitute a place of public accommodation or that Defendants' own, lease or operate a place of public accommodation.

Title III of the ADA provides generally that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). A place of public accommodation means a facility, operated by a private entity, whose operations affect commerce and fall within one of twelve enumerated categories. *See* Section 42 USC § 12181(7)(A)-(L).

1. The Uber app and website are not places of public accommodation.

As Plaintiffs admit, Uber "uses smart phone software applications to arrange rides between

1 passengers and its fleet of drivers[.]” (FAC, ¶ 27.) Websites, smartphone applications, virtual
 2 spaces or any variation thereof are not listed among Title III’s twelve “places of public
 3 accommodation.” See 42 USC § 12181(7)(A)-(L). These twelve categories are exclusive. If an
 4 entity does not fit into one of the categories, the entity is not a place of public accommodation.

5 Under Ninth Circuit law, a “place of public accommodation” is a physical place. *Weyer v.*
 6 *Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000) (concluding that places of
 7 public accommodation are “actual, physical places.”); *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017
 8 (N.D. Cal. 2012) (streaming video library was a website, not an actual physical place, and under
 9 judicial precedent, it was not a place of public accommodation under the ADA); *Young v. Facebook*
 10 *Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011) (finding that Facebook was not place of public
 11 accommodation in Title III claim by mentally disabled plaintiff alleging failure to provide
 12 reasonable customer service upon deactivation of her account). Courts have largely rejected
 13 attempts to wedge virtual environments into the ADA’s definition of public accommodations or
 14 expand the ADA’s applicability to non-physical structures even when the entity has an actual
 15 physical location. See *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1321
 16 (S.D. Fl. 2002) (noting cyberspace is a unique medium, with no particular geographical location, and
 17 therefore www.southwest.com was not place of public accommodation like ticket counter or travel
 18 agency), aff’d, 385 F.3d 1324, 1329 (11th Cir. 2004). Uber’s smartphone application, which is
 19 licensed by Rasier to the independent transportation providers who use the uberX platform to book
 20 passengers, and website exist solely in a virtual environment. Accordingly, the app, the lone
 21 “service” Uber provides, is not a place of public accommodation under Title III as a matter of law.
 22 Likewise, Uber’s website, which simply provides information regarding the app and an avenue for
 23 individuals to submit feedback regarding the app, is not a public accommodation.

24 **2. Defendants do not own, lease or operate a place of public** 25 **accommodation.**

26 Plaintiffs also allege that the *vehicles* offering transportation services through the uberX
 27 platform are places of public accommodation. (FAC, ¶ 92.) However, Defendants do not own, lease
 28 or operate these vehicles.

1 Throughout the FAC, Plaintiffs state that uberX is a “taxi service” and that Uber owns,
 2 operates or leases a fleet of vehicles. Neither of these allegations is true, and, in fact, both are
 3 directly and expressly contradicted by the rules promulgated by the California Public Utilities
 4 Commission (“CPUC”) governing “Transportation Network Companies” (TNCs), rules that
 5 Plaintiffs themselves rely upon in the FAC. (FAC, ¶ 39.)

6 As stated in the FAC, in September 2013, the CPUC issued a ruling designating uberX as a
 7 TNC. (RJN Exh. A at 25.) In finding that TNCs are charter-party carriers within the meaning of the
 8 California Public Utilities Code, the CPUC expressly distinguished “taxi services,” which are
 9 regulated by cities and/or counties, and “charter-party carrier services” subject to regulation by the
 10 CPUC. (*Id.* at 11.) The CPUC also made clear that “[u]nlike taxi cabs, which may pick up
 11 passengers via street hails, PU Code § 5360.5 requires that charter party carriers operate on a
 12 prearranged basis. We find that TNCs operate on a prearranged basis.” (*Id.* at 20.)

13 The CPUC’s Rules go on to state that a TNC like uberX is “***not permitted to itself own***
 14 ***vehicles used in its operation or own fleets of vehicles.***” *Id.* at p. 24 (emphasis added). Plaintiffs
 15 contend that the vehicles themselves are places of public accommodation yet the CPUC has
 16 effectively ruled that Uber does not own or operate those “places of public accommodation.”

17 *Adiutori v. Sky Harbor International Airport*, 880 F. Supp. 696 (D. Ariz. 1995), *aff’d* without
 18 op., 103 F.3d 137 (9th Cir. 1996) is instructive. There, the plaintiff asserted that a skycap company
 19 providing services at an airport was bound by the requirements of the ADA by virtue of the fact that
 20 it was a private entity providing a service in a “terminal, depot, or other station used for specified
 21 public transportation,” which are public accommodations under the ADA. *Id.* at 704. In ruling that
 22 the skycap company did not operate a place of public accommodation and, hence, could not be sued
 23 under Title III of the ADA, the district court pointed out that the ADA “does not state that it applies
 24 to entities which merely provide a service in a place of public accommodation, e.g. a terminal, etc.--
 25 it only applies to entities which own, lease or operate a place of public accommodation.” *Id.* There
 26 was no evidence that the skycap company owned, leased, or operated the terminal at the airport; it
 27 possessed only a permit to conduct business in the terminal. *Id.* Accordingly, the court ruled there
 28 was no basis to hold the company liable under Title III of the ADA. *Id.*

1 Similarly, Defendants' role is merely to offer to passengers and transportation providers a
 2 service (*i.e.* use of the app to connect with potential passengers) that is used to access the place of
 3 public accommodation: the transportation providers' vehicles. Because the Uber app itself (or the
 4 website for that matter) is not a place of public accommodation, and given that the CPUC has ruled
 5 that Defendants legally cannot own a fleet of vehicles (*i.e.* the places of public accommodation per
 6 Plaintiffs' FAC), Plaintiffs have failed to allege sufficient facts to show that Defendants own, lease,
 7 or operate *a place* of public accommodation.

8 To the extent Plaintiffs' ADA claim is premised on that contention, it must be dismissed. To
 9 the extent Plaintiffs' remaining Causes of Action are based on the allegation that Defendants
 10 services constitute a place of public accommodation or that Defendants own, lease or operate a
 11 public accommodation as defined by the ADA, Plaintiffs' claims fail and should be dismissed for the
 12 same reasons described above.

13 IV. CONCLUSION

14 As to Plaintiffs NFB and Hingson, Defendants respectfully request that the FAC be
 15 dismissed in its entirety due to the failure to establish standing to sue under the ADA, Unruh or the
 16 DPA. As to Plaintiff Pedersen, Defendants respectfully request that the FAC be dismissed in its
 17 entirety for failure to establish standing to sue under the ADA, Unruh or the DPA. Finally,
 18 Defendants request that as to all Plaintiffs, the FAC be dismissed to the extent based on the
 19 allegation that Defendants' services constitute a public accommodation or that Defendants own,
 20 operate or lease a place of public accommodation.

21 Dated: December 3, 2014

22
23 /s/Andrew M. Spurchise

24 ANDREW M. SPURCHISE

25 LITTLER MENDELSON, P.C.

26 Attorneys for Defendants

27 UBER TECHNOLOGIES, INC., RASIER,
 28 LLC, RASIER-CA, LLC